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CRIMINAL DISCOVERY

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## GROUND LOST AND FOUND IN CRIMINAL DISCOVERY

ROGER J. TRAYNOR

THE plea for the adversary system is that it elicits a reasonable approximation of the truth. The reasoning is that with each side on its mettle to present its own case and to challenge its opponent's, the relevant unprivileged evidence in the main emerges in the ensuing clash. Such reasoning is hardly realistic unless the evidence is accessible in advance to the adversaries so that each can prepare accordingly in the light of such evidence.

In civil litigation there is growing acceptance of the view that each side can be required before trial not only to disclose the evidence upon which it intends to rely, but also to respond to searching inquiry by its adversary.<sup>1</sup> In criminal litigation, however, there is continuing resistance to pretrial discovery, the more formidable because it has not only the force of law and habit but also the force of adrenal reaction against seemingly plausible menaces. The most cogent arguments for change encounter that resistance.<sup>2</sup>

Those who oppose pretrial discovery fear that it would give an undue advantage to the defendant, since he would continue himself to have substantial protection from discovery, notably the privilege against self-incrimination. They fear also that the defendant would misuse discovery to subvert the prosecution's case by resorting to perjury and witness-tampering whenever it

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This Article on American practice was prepared for an Anglo-American conference on criminal procedure held in London last July and sponsored by the Institute of Judicial Administration. For an illuminating discussion of the conference, see Napley, *The Criminal Trial: Anglo-American Procedure Compared*, 60 *L. Soc'y Gazette* 582 (1963).

1. *Hickman v. Taylor*, 329 U.S. 495, 501 (1947); *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 375-77, 364 P.2d 266, 275-76, 15 Cal. Rptr. 90, 98-99 (1961). See Louisell, *Discovery and Pre-Trial Under the Minnesota Rules*, 36 *Minn. L. Rev.* 633, 639 (1952).

2. See Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 *Wash. L.Q.* 279; Garber, *The Growth of Criminal Discovery*, 1 *Crim. L.Q.* 3 (1962); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 *Yale L.J.* 1149 (1960); Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 *Stan. L. Rev.* 293 (1960); Kaufman, *Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts*, 57 *Colum. L. Rev.* 1113 (1957); Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 *Calif. L. Rev.* 56 (1961); Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 *W. Va. L. Rev.* 221, 239-41 (1957); *Discovery in Federal Criminal Cases*, A Symposium at the Judicial Conference of the District of Columbia Circuit, 33 *F.R.D.* 47 (1963).

seemed expedient to do so in the light of what he had discovered.<sup>3</sup> What they overlook is that the protection afforded the defendant against discovery is in large measure counterbalanced by the abundant resources for investigation available to the prosecution<sup>4</sup> and the corresponding opportunity it has to guard against perjury and witness-tampering. In any event, one cannot predict such dire misuse when there is such paucity of experience as to preclude meaningful extrapolation.<sup>5</sup>

Moreover, there has been no uniformity in the development of discovery, either before or at the trial, in common-law jurisdictions that have experimented with it. There are no settled norms regarding discovery by the defendant. As to reciprocal discovery by the prosecution, there is as yet little more than an occasional requirement that the defendant give advance notice of specified defenses. What is significant is that in those jurisdictions that have adopted discovery procedures, the trend is toward expansion rather than restriction or abandonment.

However clear the general trend, the day-to-day course of criminal discovery is still one of trial and error, perhaps inevitably so in a land of great diversity and dimension. The states are free to adopt their own rules of criminal procedure so long as those rules comply with the minimum requirements of fairness imposed upon the states by the due process clause of the fourteenth amendment of the United States Constitution.<sup>6</sup> There is accordingly great variation in the local development of pretrial discovery in criminal cases. One can generalize, however, that many state courts follow discovery procedures akin to those in the federal courts, which are in the main restrictive. One can also generalize that though the trend is toward liberalizing discovery, few states have moved so far in this direction as California.<sup>7</sup> What these

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3. *United States v. Garsson*, 291 Fed. 646, 649 (S.D.N.Y. 1923); *State v. Tune*, 13 N.J. 203, 210, 98 A.2d 881, 884 (1953); *State v. Rhoads*, 81 Ohio St. 397, 424-25, 91 N.E. 186, 192 (1910). See Flannery, *The Prosecutor's Case Against Liberal Discovery*, 33 F.R.D. 74 (1963). Compare Walsh, *Fair Trials and the Federal Rules of Criminal Procedure*, 49 A.B.A.J. 853, 854 (1963), opposing expanded discovery by the Government because of the possibility of witness tampering.

4. See Goldstein, *supra* note 2, at 1182-83.

5. See Brennan, *supra* note 2, at 290-91.

6. See text accompanying notes 78-81 *infra*.

7. In California, the appellate courts have played the major role in developing criminal discovery; in other jurisdictions, the trial courts have usually taken the initiative. See Fletcher, *supra* note 2, at 297; Garber, *supra* note 2, at 10. Encouraged by appellate decisions that cautiously recognized their discretionary power to grant discovery while approving its denial in the case at hand, see, e.g., *State v. Cicienia*, 6 N.J. 296, 300, 78 A.2d 568, 570-71 (1951); *State v. Payne*, 25 Wash. 2d 407, 411-12, 171 P.2d 227, 230 (1946), state trial courts have been increasingly willing to grant pretrial discovery in criminal cases. Although they have



generalizations suggest, as a way to some perspective on a large and changing panorama, is a comparison between restrictions on discovery representative of federal procedure (and representative still of procedure in many states) and the extensions of discovery in California, a pilot state.

The federal courts allow discovery only in isolated cases, and even then only when the moving party is able to particularize a need or interest. No one seems quite certain about the particulars of particularization. There is no discernible rational pattern in the needs and interests that are recognized as grounds for discovery.<sup>8</sup> One can imagine the baffling problems of particularizing a need or interest when the party has no access to the evidence he seeks to discover. How does Tantalus particularize that which is out of his sight as well as his reach? The homely question put by John Marshall in the *Aaron Burr Case* answers itself—"Now, if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents?"<sup>9</sup> In the face of Chief Justice Marshall's rhetorical question, the federal courts continue to bar the door to discovery if there are no magic words of particularization to open it. The door is even more severely barred against discovery for the purpose of justifying discovery.<sup>10</sup>

Such wariness is not mandatory under the three sources of authority governing discovery in federal criminal cases. Statutes comprise one; of these, the most important is the Jencks Act,<sup>11</sup> which prohibits pretrial discovery of statements given by witnesses to government agents, but does authorize limited discovery of such statements at the trial. A number of other matters are

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been occasionally rebuffed even in recent years, *Walker v. People*, 126 Colo. 135, 162-63, 248 P.2d 287, 302 (1952); *Rosier v. People*, 126 Colo. 82, 92-93, 247 P.2d 448, 453 (1952); *State v. District Court*, 135 Mont. 545, 549-50, 342 P.2d 1071, 1074-75 (1959); *State v. Tune*, 13 N.J. 203, 210-11, 98 A.2d 881, 884 (1953); *Commonwealth v. Wable*, 382 Pa. 80, 86, 114 A.2d 334, 337-38 (1955), there is much in the trend of recent decisions to encourage them to exercise their discretion in favor of granting discovery. *State ex rel. Mahoney v. Superior Court*, 78 Ariz. 74, 275 P.2d 887 (1954); *People v. Johnson*, 356 Mich. 619, 97 N.W.2d 739 (1959); *State v. Johnson*, 28 N.J. 133, 135-42, 145 A.2d 313, 315-18 (1958); *Layman v. State*, 355 P.2d 444 (Okla. Crim. App. 1960); *State ex rel. Sadler v. Lackey*, 319 P.2d 610 (Okla. Crim. App. 1957); *Petition of Di Joseph*, 394 Pa. 19, 145 A.2d 187 (1958) (concurring opinion); *State v. Thompson*, 54 Wash. 2d 100, 338 P.2d 319 (1959). See generally Fletcher, *supra* note 2; Garber, *supra* note 2.

8. Cf. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682-83 (1958).

9. *United States v. Burr*, 25 Fed. Cas. 187, 191 (C.C. Va. 1807).

10. "It would indeed defeat . . . [the Jencks Act's] design to hold that the defense may see statements in order to argue whether it should be allowed to see them." *Palermo v. United States*, 360 U.S. 343, 354 (1959).

11. 18 U.S.C. § 3500 (1958).

governed by the Federal Rules of Criminal Procedure, promulgated by the Supreme Court under congressional authorization; the rules impose no martinet commands of particularization. Finally, the federal courts themselves have declared, though all too rarely exercised, their inherent power to grant discovery when necessary to achieve justice.<sup>12</sup>

At the pretrial stage in the federal courts, discovery operates largely to the advantage of the prosecution. As Professor Goldstein has noted, the grand jury hearing can be used as "a full-fledged deposition procedure for the prosecution without the embarrassing presence of defendant or his counsel."<sup>13</sup> Even though the prosecution does not ordinarily call a defense witness before the grand jury, it can do so whenever discovery seems appropriate, as, for example, in antitrust cases. No comparable discovery is available to the defendant, for depositions are limited by Federal Rule 15(a) to cases where "it appears that a prospective witness may be unable to attend or prevented from attending a trial."

Only rarely can the defendant obtain a copy of the grand jury testimony before the trial. Rule 6(e) permits disclosure of grand jury minutes to government attorneys, but makes disclosure to the defendant dependent upon the discretion of the court.<sup>14</sup> The Supreme Court has ruled that such discretion should be exercised in favor of discovery only upon a showing of "particularized need."<sup>15</sup> There has been recognition of only two such needs at the pretrial stage. A majority of the cases permit disclosure of the defendant's testimony to the grand jury when the charge is

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12. See, e.g., *Palermo v. United States*, 360 U.S. 343, 345 (1959) (dictum); *Jencks v. United States*, 353 U.S. 657 (1957) (by implication); *Shores v. United States*, 174 F.2d 838, 845 (8th Cir. 1949) (dictum); *United States v. Duncan*, 22 F.R.D. 295, 299 (S.D.N.Y. 1958) (dictum); Kaufman, *supra* note 2, at 1121. For a discussion of federal criminal discovery prior to the federal rules, see Orfield, *supra* note 2, at 233-39.

13. Goldstein, *supra* note 2, at 1191.

14. Rule 6(e) reads,

Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

15. *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 683 (1958).



that the defendant perjured himself by that testimony.<sup>16</sup> Disclosure is also possible upon a motion to dismiss the indictment, though only if the grounds for dismissal are specified and the facts supporting them are set forth with particularity.<sup>17</sup> Paradoxically, the defendant can neither examine the grand jury minutes to ascertain if there are grounds for dismissal<sup>18</sup> nor take depositions from witnesses or grand jurors for that purpose.<sup>19</sup>

The Supreme Court's principal justification for its rule against discovery of grand jury testimony—that the effective operation of the grand jury requires secret proceedings<sup>20</sup>—is belied by the experience of a number of states that permit defense examination of grand jury transcripts.<sup>21</sup> Professor Sherry rightly

16. *United States v. Rose*, 215 F.2d 617, 628-30 (3d Cir. 1954); *United States v. Remington*, 191 F.2d 246, 250-51 (2d Cir. 1951), cert. denied, 343 U.S. 907 (1952); *United States v. White*, 104 F. Supp. 120, 121 (D.N.J. 1952). Contra, *United States v. Owen*, 11 F.R.D. 371 (W.D. Mo. 1951). See generally Note, 111 U. Pa. L. Rev. 1154, 1179-80 (1963).

17. See, e.g., the following cases, all of which denied discovery: *United States v. Nasser*, 301 F.2d 243, 245-46 (7th Cir.), cert. denied, 370 U.S. 923 (1962); *United States v. Stromberg*, 22 F.R.D. 513, 519 (S.D.N.Y. 1957); *United States v. Lieberman*, 15 F.R.D. 278, 280 (S.D.N.Y. 1953); *United States v. Aman*, 13 F.R.D. 430 (N.D. Ill. 1953). See generally Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 449 (1959); Note, *Disclosure of Grand Jury Minutes To Challenge Indictments and Impeach Witnesses in Federal Criminal Cases*, 111 U. Pa. L. Rev. 1154, 1157-76 (1963).

18. See Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 Calif. L. Rev. 56, 69 n.50 (1961).

19. See, e.g., *United States v. Silverman*, 132 F. Supp. 820, 822-23 (D. Conn. 1955) (refusing to permit defendant to examine grand jury foreman).

20. See *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). In *United States v. Procter & Gamble Co.*, supra, at 681 n.6, the Supreme Court quoted from *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954), in which the court summarized the reasons for grand jury secrecy as follows:

(1) To prevent the escape of those who indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

The speciousness of these reasons, particularly when used, as in *Pittsburgh Plate Glass Co. v. United States*, supra, to prevent discovery at the trial for the purpose of impeachment, has been pointed out by many writers. See, e.g., *Pittsburgh Plate Glass Co. v. United States*, supra, at 405-07 (Brennan, J., dissenting); Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 Calif. L. Rev. 56, 69-71 (1961); Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 Va. L. Rev. 668, 674 (1962); Note, 11 Stan. L. Rev. 297, 323-34 (1959); 48 Calif. L. Rev. 160 (1960).

21. See Sherry, supra note 20, at 679-84. At least three states supply the defendant with a transcript of the grand jury proceedings. Cal. Pen. Code § 938.1; Iowa Code § 772.4 (1962); Ky. Crim. Code § 110 (1958). Cf. Minn. Stat. § 628.04 (1961).

concludes that "in the light of this experience, . . . the prevailing, traditional policy of secrecy is an anachronism that has long outlived any real necessity."<sup>22</sup>

Apart from prosecution discovery by means of the grand jury, there is little pretrial criminal discovery available in the federal courts. There are no procedures analogous to the depositions and interrogatories, requests for admissions, or compulsory medical examinations authorized for civil cases by the Federal Rules of Civil Procedure. The defendant can move for a bill of particulars to the indictment under rule 7(f) "to enable him to adequately prepare his defense and to avoid surprise at the trial."<sup>23</sup> Granting of a bill of particulars, however, lies almost entirely within the discretion of the trial judge,<sup>24</sup> and bills are seldom granted for the disclosure of evidentiary matters.<sup>25</sup> In capital cases the prosecution is required by statute to furnish the defense with a list of the witnesses it will present at the trial,<sup>26</sup> but it need not do so until three days before the trial; the defense then has little time to locate and interview the witnesses. The defendant in noncapital cases ordinarily cannot obtain the names or addresses of prosecution witnesses.<sup>27</sup> Pretrial discovery of statements of witnesses to government investigators is prohibited by the Jencks Act.<sup>28</sup> The federal courts bar discovery even of the defendant's own statements, explicitly excluded from the statutory prohibition, apparently for no better reason than that no statute or rule specifically authorizes such discovery.<sup>29</sup>

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22. Sherry, *supra* note 20, at 684.

23. *Rodella v. United States*, 286 F.2d 306, 310 (9th Cir. 1960), cert. denied, 365 U.S. 889 (1961).

24. See, e.g., *Wong Tai v. United States*, 273 U.S. 77, 82 (1927); *United States v. Holovachka*, 314 F.2d 345, 349 (7th Cir.), cert. denied, 374 U.S. 809 (1963).

25. See, e.g., *Cooper v. United States*, 282 F.2d 527, 532 (9th Cir. 1960); *Kansas City Star Co. v. United States*, 240 F.2d 643, 650 (8th Cir.), cert. denied, 354 U.S. 923 (1957); *Johnson v. United States*, 207 F.2d 314, 320 (5th Cir. 1953), cert. denied, 347 U.S. 938 (1954). But cf. *United States v. Lipshitz*, 150 F. Supp. 321 (E.D.N.Y. 1957) (fact that evidence will be disclosed not ground for denial of bill of particulars). The bill of particulars has been a useful discovery device in certain tax evasion prosecutions. See *United States v. O'Connor*, 237 F.2d 466, 476 (2d Cir. 1956); *United States v. Eissner*, 206 F. Supp. 103 (N.D.N.Y. 1962).

26. 18 U.S.C. § 3432 (1958).

27. *Dean v. United States*, 265 F.2d 544, 547 (8th Cir. 1959); *United States v. Hanlin*, 29 F.R.D. 481, 486 (W.D. Mo. 1962). But see *United States v. Solomon*, 26 F.R.D. 397, 407 (S.D. Ill. 1960). If the defendant is an indigent who must subpoena his witnesses, rule 17(b) requires him to reveal their names and their expected testimony, thus giving the prosecution an effective avenue of discovery. See *Thomas v. United States*, 168 F.2d 707 (5th Cir. 1948); *Pye, The Defendant's Case for More Liberal Discovery*, 33 F.R.D. 82, 84, 98 (1963).

28. 18 U.S.C. § 3500(a) (1958), quoted in note 50 *infra*.

29. See authorities cited in note 34 *infra*. The defendant has a limited opportunity to discover something about the case against him at the preliminary

Federal Rules 16 and 17 provide for limited pretrial inspection and copying of documents and other tangible objects. Rule 16, the only rule keyed to discovery,<sup>30</sup> is fettered with the proviso that the items sought must have been obtained from or have belonged to the defendant or have been obtained from others by seizure or by process.<sup>31</sup> As this proviso makes clear, rule 16 was not designed to facilitate discovery of documents crucial to the preparation of a defense. Its purposes are more mundane: to protect the property right of the defendant in objects belonging to him and to insure him continuing access to any documents that the prosecution seizes from third persons through its subpoena power.<sup>32</sup> The courts have interpreted rule 16 accordingly.<sup>33</sup> Though a defendant may freely inspect a business document, he may not see a purported confession in which he unfortunately has no property right.<sup>34</sup> He may inspect documents obtained from third persons by seizure, but not documents obtained by threat of seizure.<sup>35</sup> In matters of such importance, ritual is king as well as the joker.

Rule 17(c),<sup>36</sup> essentially a codification of the ancient power

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examination where the prosecution must show that there is probable cause to hold him. Fed. R. Crim. P. 5(c). No preliminary examination need be held, however, if the defendant is prosecuted by information, *United States v. Pickard*, 207 F.2d 472, 474 (9th Cir. 1953), or if he has already been indicted before arrest or before the time set for the examination. See, e.g., *Boone v. United States*, 280 F.2d 911 (6th Cir. 1960); *United States v. Universita*, 192 F. Supp. 154 (S.D.N.Y. 1961); *United States v. Gray*, 87 F. Supp. 436 (D.D.C. 1949).

30. See *Bowman Dairy Co. v. United States*, 341 U.S. 214, 218-21 (1951). See also Orfield, *supra* note 2, at 330.

31. Fed. R. Crim. P. 16 reads,

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

32. See *United States v. Wortmen*, 26 F.R.D. 183, 197 (E.D. Ill. 1960); Note of the Advisory Committee to Fed. R. Crim. P. 16; Kaufman, *supra* note 2, at 1114 n.7.

33. See generally Orfield, *supra* note 2, at 241-57, where the author summarizes all of the cases under Rule 16 from its adoption through 1957.

34. See, e.g., *United States v. Murray*, 297 F.2d 812, 820 (2d Cir.), cert. denied, 369 U.S. 828 (1962); *Shores v. United States*, 174 F.2d 838, 842-45 (8th Cir. 1949). See *Developments in the Law—Discovery*, 74 Harv. L. Rev. 940, 1053 (1961). Cf. *United States v. Kahaner*, 203 F. Supp. 78, 85-87 (S.D.N.Y. 1962) (statements in grand jury testimony). See also *United States v. Fancher*, 195 F. Supp. 448, 451-58 (D. Conn. 1961), and cases cited therein.

35. See, e.g., *United States v. Hanlin*, 29 F.R.D. 481, 486 (W.D. Mo. 1962); *United States v. Brown*, 179 F. Supp. 893, 896 (E.D.N.Y. 1959).

36. Fed. R. Crim. P. 17(c) reads,

A subpoena may also command the person to whom it is directed to pro-



of the federal courts to issue subpoenas *duces tecum*,<sup>37</sup> has been interpreted by the Supreme Court as affording discretion to the trial judge to grant pretrial discovery of items to facilitate "a good-faith effort . . . to obtain evidence."<sup>38</sup> The lower federal courts, however, generally bar discovery of an item unless it would be directly admissible at the instance of the moving party; hence, evidence admissible only at the instance of the party possessing it or admissible only to impeach a witness cannot be discovered under rule 17(c).<sup>39</sup>

One familiar with the steady development of criminal discovery in his own state for nearly a decade may be permitted to note that pretrial discovery in the federal courts appears by comparison not only inadequate, but riddled with arbitrary rules. A proposed amendment to rule 16 would be a great step forward. It would permit defense inspection of any documents or other real evidence in the possession of the Government (except statements of witnesses beyond the reach of discovery under the Jencks Act), including both statements by the defendant and the results of physical examinations and scientific tests.<sup>40</sup> The proposed amendment, however, would not remedy other deficiencies.

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duce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

37. See Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 Calif. L. Rev. 56, 72 (1961); Note, *The Scope of Criminal Discovery Against the Government*, 67 Harv. L. Rev. 492, 495 (1954).

38. *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951).

39. See, e.g., *United States v. Murray*, 297 F.2d 812, 821-22 (2d Cir.), cert. denied, 369 U.S. 828 (1962). See also Kaufman, *supra* note 2, at 1116; *Developments in the Law—Discovery*, *supra* note 34, at 1054; Note, 67 Harv. L. Rev. 492, 496-98 (1954).

40. Amended rule 16 would read,

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, *which are within the possession, custody or control of the government, including written or recorded statements or confessions made by the defendant and the results or reports of physical examinations and scientific tests, experiments and comparisons*, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just. *This rule does not authorize the discovery or inspection of statements or reports made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.*

Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Proposed Amendments to Rules of Criminal Procedure for the United States District Courts* (Preliminary Draft Dec. 1962).

Federal discovery would continue to be a one-stage process. Only if the defense fortuitously knows of items discoverable under rule 16 or rule 17 can it invoke discovery; there is no procedure enabling it to discover whether there are discoverable items. Moreover, there is no procedure for discovering the names and addresses of witnesses.<sup>41</sup> The defense confronts many witnesses for the first time in the contentious atmosphere of courtroom cross-examination, when the witness has already allied himself with the prosecution and may have rehearsed his testimony with the prosecutor. It is not easy to elicit impartial testimony from a witness under such circumstances. Moreover, the trial may run its course without the defense's ever becoming aware of potential witnesses not called by the prosecution.

The pretrial conference, on which the Federal Rules are as yet silent,<sup>42</sup> has occasionally been initiated by a federal judge, usually to expedite the course of a complex criminal case.<sup>43</sup> Some discovery often ensues. Frequently, there are stipulations narrowing the issues to be tried, comparable to those that arise out of requests for admissions in civil cases. Frequently, submission of documents to opposing counsel at the pretrial conference obviates dispute at the trial as to their authenticity. Frequently, agreements made at the pretrial conference facilitate discovery at the trial.<sup>44</sup> Occasionally, the conference opens the way to inspection of otherwise undiscoverable documents.<sup>45</sup>

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41. Proposed federal rule 12A would require a defendant, upon demand, to file notice of intent to rely on an alibi defense. It lacks any requirement that either side notify the other of the witnesses it will present on the issue of alibi, a lack that the California Law Revision Commission suggests makes an alibi statute "of little value." 3 Cal. Law Revision Comm'n Rep. J-20 (1961).

42. Proposed federal rule 17A is now under consideration:

At any time after the filing of the indictment or information the court upon motion of either party or upon its own motion may order the parties to appear before it for one or more conferences to consider such matters as will promote a fair and expeditious trial. No admission of guilt at the conference shall bind the defendant or be admissible in evidence. This rule shall not be invoked in the case of a defendant who is not represented by counsel.

Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *supra* note 40. A similar proposal was rejected when the Supreme Court adopted the original Federal Rules of Criminal Procedure in 1944. See 4 Barron, *Federal Practice and Procedure: Criminal* § 1803, at 10-12 (rules ed. 1951). See also Judge James Alger Fee's vigorous opposition to pretrials in criminal cases, 4 F.R.D. 338 (1946).

43. See Advisory Committee's Notes to proposed rule 17A and articles cited therein.

44. See, e.g., Kaufman, *Pre-Trial in Criminal Cases*, 42 J. Am. Jud. Soc. 150, 151-54 (1959), discussing procedures used in *United States v. Lev*, 22 F.R.D. 490 (S.D.N.Y. 1957) and *United States v. Stromberg*, 22 F.R.D. 513 (S.D.N.Y. 1958).

45. See, e.g., Kaufman, *The Appalachian Trial: Further Observations on Pre-Trial in Criminal Cases*, 44 J. Am. Jud. Soc. 53, 55 (1960). In the Appalachian case, the Government permitted defense pretrial examination of documents,



Some federal prosecutors allow the defense extensive pretrial inspection of government evidence. They report that such inspection not only has expedited trials, but in some cases has convinced the defense of the strength of the prosecution's case and thereby induced a plea of guilty.<sup>46</sup> However welcome such developments may be, the troubling fact remains that so long as the availability of pretrial discovery to the defendant depends upon the discretion of his adversary, the prosecutor, there is always the risk of unequal treatment, the more to be questioned because it is needless. Even the most fairminded prosecutor is still an advocate and hence is not ideally situated to determine when a legal process should be made available to a defendant and when not. Such determinations are freighted with risk, even when they rest on most plausible grounds. Thus, if a prosecutor bars discovery except when his evidence is so strong that discovery might induce the defendant to plead guilty,<sup>47</sup> he may seriously discriminate against the defendant who is barred from discovering the weakness of the evidence against him. Such a bar operates with particular severity against the defendant least able to afford astute counsel and hence most in need of discovery.

Again, if a prosecutor bars discovery except to a defense attorney who answers to his concept of a trustworthy opponent, or at least a good risk, he in effect imposes his own standards on the criminal bar<sup>48</sup> and discriminates against defendants represented by counsel whom he chooses to lock out from discovery. Even a defense attorney who has received the boon of discovery from the prosecutor may feel constrained not to use disclosures with maximum effectiveness, however proper such use would be, lest he be cut off from discovery in future cases.<sup>49</sup> There is always the risk that in the contentious atmosphere of a trial a prosecutor may view a defense attorney's quite proper use of his disclosures as an abuse of his generosity. Pretrial discovery can operate effectively only if it is impartially administered in accord with

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including confessions of the defendants and alleged co-conspirators, and of grand jury minutes.

46. See *Estes*, Pre-Trial Conferences in Criminal Cases, 23 F.R.D. 560 (1959). Cf. *Brennan*, Remarks on Discovery, 33 F.R.D. 56, 58 (1963). For a discussion of the use of informal discovery procedures in the District of Columbia, see Junior Bar Ass'n of D.C., Conference Papers on Discovery in Federal Criminal Cases, 33 F.R.D. 101, 113-28 (1963).

47. See *Comisky*, Basic Criminal Procedure 37 (1958); *Brennan*, *supra* note 2, at 283; *Louisell*, Criminal Discovery: Dilemma Real or Apparent?, 49 Calif. L. Rev. 56, 59 n.6 (1961).

48. See *Brennan*, *supra* note 2, at 283; *Louisell*, *supra* note 2, at 59.

49. See *Pye*, Discovery in Federal Criminal Cases, 33 F.R.D. 82, 85 (1963); *Remington*, Discovery in Federal Criminal Cases, 33 F.R.D. 67, 71 (1963).

objective standards free of adversary considerations of trial strategy.

Federal practice permits additional discovery at the trial. Thus, the need for prior inconsistent statements of a witness for the purpose of impeachment qualifies as a "particularized need" sufficient to justify their discovery. The Jencks Act provides for discovery of prior statements of a witness<sup>50</sup> except those made before a grand jury.<sup>51</sup> Federal Rule 6(e) authorizes discretionary discovery of grand-jury statements for purposes of impeachment.<sup>52</sup> Such discovery, however, is subject to two procedural limitations. First, statements can be given to the judge instead of to the defendant, and the judge deletes whatever does not relate to the testimony at trial.<sup>53</sup> In grand-jury statements, he may also delete whatever does not appear inconsistent with the trial testimony.<sup>54</sup> Although the entire statements are reviewable on appeal,<sup>55</sup> counsel cannot discover what has been deleted and therefore cannot effectively argue its relevance and importance. Such court inspection, however, affords a compromise of sorts

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50. 18 U.S.C. § 3500 (1958). The act reads, in part,

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(e) The term 'statement,' as used in subsections (b), (c), and (d) . . . means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

51. *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 398 (1959).

52. See *United States v. Procter & Gamble Co.*, 356 U.S. 677, 683 (1958) (dictum).

53. Jencks Act, 18 U.S.C. § 3500(c) (1958).

54. See, e.g., *Gordan v. United States*, 299 F.2d 117, 119 (D.C. Cir. 1962), cert. denied, 374 U.S. 839 (1963); *United States v. Spangelet*, 258 F.2d 338, 341 (2d Cir. 1958). In *De Binder v. United States*, 292 F.2d 737 (D.C. Cir. 1961), the court allowed direct examination of a witness's grand jury testimony without a prior in camera inspection by a judge, but this procedure has not subsequently been followed. See Note, 111 U. Pa. L. Rev. 1154, 1189 n.244 (1963). Compare *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 401 (1959).

55. *United States v. Zborowski*, 271 F.2d 661, 665 (2d Cir. 1959); Jencks Act, 18 U.S.C. § 3500(c) (1958).

between the defendant's right to use the statements and the Government's need to withhold information not relating to the witness' testimony. The second and more serious limitation in the federal courts (except the Second Circuit) is the requirement of a showing of probable inconsistency as a condition to the judge's examination of grand-jury testimony.<sup>56</sup> Lacking access to the grand-jury minutes, defense counsel must depend on the chance of a concession by the prosecution, or an admission by the witness, to make a showing of prior inconsistency.

Thus, discovery in federal practice is too often based on chance or on arbitrary rules. There is little logic in thus limiting discovery of statements of witnesses, testimony before the grand jury, and other relevant material locked in the prosecutor's files, to impeaching evidence and other evidence admissible at the trial. Only if discovery is extended to all relevant unprivileged information not otherwise readily available can a defendant have reasonable assurance of ferreting out significant leads to admissible defense evidence. There would still be sufficient constraint on discovery in the protection of privileged information and in judicial discretion to bar discovery upon a showing that there is danger of abuse.

The statutory law and the Federal Rules, inadequate not only in themselves but in combination and diluted further by paltry interpretation, have led only to the most rudimentary form of criminal discovery. It ekes out an existence in a still unfavorable environment. Judges continue to bar discovery upon the rationalization, at odds with the apparent intention of the draftsmen of the rules,<sup>57</sup> that failure to authorize discovery is an implied prohibition of it. Whatever the improvement offered by the proposed amendments to the rules, the future of discovery in

56. The Second Circuit orders an in camera examination of the minutes to discover possible inconsistencies without requiring any showing that inconsistencies probably exist. See, e.g., *United States v. Hernandez*, 290 F.2d 86, 88-89 (2d Cir. 1961); *United States v. Giampa*, 290 F.2d 83, 85-86 (2d Cir. 1961). The District of Columbia Circuit requires an in camera examination without any prior showing when the Government's case depends upon the testimony of a single key witness. *Gordan v. United States*, 299 F.2d 117 (D.C. Cir. 1962), cert. denied, 374 U.S. 839 (1963). Other circuits generally require a prior showing of probable inconsistency. See, e.g., *Berry v. United States*, 295 F.2d 192 (8th Cir. 1961), cert. denied, 368 U.S. 955 (1962); *Bary v. United States*, 292 F.2d 53, 56 (10th Cir. 1961); *Herzog v. United States*, 226 F.2d 561, 566-67 (9th Cir. 1955), cert. denied, 352 U.S. 844 (1956). See generally Note, *Disclosure of Grand Jury Minutes To Challenge Indictment and Impeach Witnesses in Federal Criminal Cases*, 111 U. Pa. L. Rev. 1154, 1181-95 (1963). Of course, no showing of probable inconsistency is necessary to require production under the Jencks Act, 18 U.S.C. § 3500(b) (1958). *Campbell v. United States*, 373 U.S. 487, 497 n.13 (1963).

57. See Fed. R. Crim. P. 57(b); *United States v. Taylor*, 25 F.R.D. 225, 228 (E.D.N.Y. 1960); Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. Va. L. Rev. 312, 334-37 (1957); Note, *The Scope of Criminal Discovery Against the Government*, 67 Harv. L. Rev. 492, 498-99 (1954).



federal prosecutions looks unpromising so long as the federal courts fail to exercise their inherent power to foster a wholesome integration of discovery procedures into the judicial process.<sup>58</sup>

It is not without significance that since the *Jencks* case<sup>59</sup> the federal courts have been reluctant to exercise their inherent powers to permit discovery. The *Jencks* case involved the prosecution of a labor union official for filing a false noncommunist affidavit with the National Labor Relations Board. At the trial, two key government witnesses admitted making prior statements to the Federal Bureau of Investigation concerning the defendant's communist activities.<sup>60</sup> The defendant, in vain, requested the trial judge to examine the statements and deliver any parts admissible to impeach the witnesses. The Supreme Court held that such statements should be accessible to the defense without a preliminary showing of probable inconsistency;<sup>61</sup> moreover, the Court found it incumbent upon the trial judge to deliver whatever related to the testimony at the trial without sifting the statements for impeachment value.<sup>62</sup> "Justice," said the Court, "requires no less."<sup>63</sup>

It was generally understood that this decision authorized discovery even though no specific statute or rule was applicable. Thereafter, one federal court of appeals applied the *Jencks* ruling to grand-jury testimony,<sup>64</sup> and some district courts allowed pretrial discovery of witnesses' statements.<sup>65</sup>

In Congress, however, a different attitude prevailed. The *Jencks* case had involved communist activities, and there was fear in Congress that the Supreme Court's decision would compel the Government to reveal confidential information about its anti-communist operations.<sup>66</sup> The fear found typical expression in one congressman's lament that "the FBI files . . . were in effect declared sitting ducks in an open hunting season by the Supreme

58. See the memorandum opinion of Justice Frankfurter, declining to join the Court's adoption of the Federal Rules of Criminal Procedure, 323 U.S. 821 (1944). Compare Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. L.Q. 279, 293-94. See also *Miner v. Atlass*, 363 U.S. 641, 643-44, 652-65 (1960).

59. *Jencks v. United States*, 353 U.S. 657 (1957).

60. In view of a chronic tendency of one of the key witnesses' testimony to become more damaging with each retelling, see *United States v. Flynn*, 130 F. Supp. 412, 417-19 (S.D.N.Y. 1955), obtaining copies of his pretrial statement would be a matter of considerable importance to the defense.

61. 353 U.S. at 666-68.

62. *Id.* at 668-69.

63. *Id.* at 669.

64. *United States v. Rosenberg*, 245 F.2d 870 (3d Cir. 1957) (per curiam).

65. See cases discussed in Note, *The Aftermath of the Jencks Case*, 11 Stan. L. Rev. 297, 316-17 (1959); Comment, *The Jencks Legislation: Problems in Prospect*, 67 Yale L.J. 674, 683 n.34 (1958).

66. See generally Murphy, *Congress and the Court* 127-53 (1962).

Court of the United States. . . ."<sup>67</sup> Out of the congressional hubbub, the Jencks Act emerged. It confirmed the *Jencks* holding on the production of witnesses' statements at trial, but prohibited their discovery prior to trial and avoided mention of other controversial matters, such as discovery of grand jury testimony and prior statements of the defendant.<sup>68</sup> There was no mistaking the clear legislative purpose of *Yes*, *No*, and *Maybe*.

In the courts, *Yes* struck a responsive lost-and-found chord; *No* struck a responsive dominant chord; and *Maybe* struck out. Virtually no federal courts have since invoked their inherent power to permit pretrial discovery.<sup>69</sup> In *Palermo v. United States*,<sup>70</sup> the Supreme Court held that the Jencks Act provides the exclusive means for discovery of statements by government witnesses and that since summaries or memoranda not representing the witness's own words are not statements within the act, they are not discoverable at all.<sup>71</sup>

All told, pretrial discovery lost ground. Lower federal courts circumscribed it with the *No* of the Jencks Act and undertook to circumscribe it further by taking a negative view of *Maybe*. The trend of recent cases is against discovery of defendant's confessions<sup>72</sup> and of documents voluntarily surrendered by third parties.<sup>73</sup> The denial of discovery of a confession constitutes a saliently negative use of judicial discretion. Even though the Supreme Court has consistently declared that discovery is "the better practice,"<sup>74</sup> a majority of federal courts have discouraged that practice.

67. Comment, 67 Yale L.J. 674, 681 (1958), quoting Representative Collier of Illinois.

68. See note 50 supra.

69. Cf. *United States v. Taylor*, 25 F.R.D. 225, 228 (E.D.N.Y. 1960). Only the most inordinately aggravated circumstances would now seem to call for the exercise of this power. See the discussion of *United States v. Murray*, 297 F.2d 812 (2d Cir.), cert. denied, 369 U.S. 828 (1962), in 47 Minn. L. Rev. 693, 698-99 (1963).

70. 360 U.S. 343 (1959).

71. One of the key issues under the Jencks Act is what constitutes a discoverable statement. The restrictive interpretation stated in the *Palermo* case was recently relaxed in *Campbell v. United States*, 373 U.S. 487 (1963). There, an FBI agent took notes while interviewing a witness and then, by referring to the notes, reiterated the witness's story for his approval; several hours later, the agent dictated an interview report based on both the notes and his memory. The Supreme Court upheld a trial judge's finding that this report was a copy of a statement made and adopted by the witness and, therefore, was within subsection (e) (1) of the Jencks Act. See generally Note, The Jencks Act: After Six Years, 38 N.Y.U.L. Rev. 1133, 1142-46 (1963).

72. Advisory Committee's Notes to proposed amendment to Rule 16. See note 34 supra.

73. See note 35 supra.

74. See *Cicenia v. Lagay*, 357 U.S. 504, 511 (1958); *Leland v. Oregon*, 343 U.S. 790, 801 (1952).



Thus, discovery has lost more ground than was necessary under the Jencks Act, which actually ratified the *Jencks* decision in principle and in much detail of procedure. Far from nullifying the inherent power of the federal courts to provide for discovery, Congress left them ample room to exercise that power freely. Even if we allow for the dampening effect of the restrictive interpretation put on the Jencks Act in the *Palermo* case,<sup>75</sup> there is nothing in the act to impel the federal courts to discourage discovery of grand-jury transcripts or to bar discovery of confessions or the results of scientific tests. There could have been at least a standstill, if not a drift toward a modern system of criminal discovery. There was no need to translate so much of *Maybe* into *No*. As Justice Brennan observed in his concurring opinion in the *Palermo* case, the commands of the Constitution in this area are "close to the surface."<sup>76</sup> A defendant has hardly had a fair trial if he has been denied the opportunity to discover evidence or information crucial to his defense.

The ground thus lost by the federal courts is in part counterbalanced by recent decisions of the United States Supreme Court implementing the constitutional right to a fair trial. Though it is the right that has been in the foreground, its implementation has involved an expansion of discovery, at least at the trial itself,<sup>77</sup> for defendants in both federal and state courts. Proceeding from the proposition that it is a denial of due process for the prosecution to use perjured testimony knowingly,<sup>78</sup> to suppress evidence favorable to the defense deliberately,<sup>79</sup> or to allow unsolicited false testimony to go uncorrected,<sup>80</sup> the Supreme Court has concluded that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."<sup>81</sup>

75. *Palermo v. United States*, 360 U.S. 343 (1959).

76. *Id.* at 362-63. See Brennan, *supra* note 58, at 294 n.46.

77. Since only the complete denial of discovery would appear to present questions of constitutional stature, there probably is no constitutional right to pre-trial discovery; discovery at trial coupled with a continuance if necessary would probably be adequate to meet constitutional requirements.

78. *Pyle v. Kansas*, 317 U.S. 213, 216 (1942); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

79. *Pyle v. Kansas*, *supra* note 78; *Wilde v. Wyoming*, 362 U.S. 607 (1960). See *Powell v. Wiman*, 287 F.2d 275, 281-82 (5th Cir. 1961); *United States ex rel. Almeida v. Baldi*, 195 F.2d 815, 820 (3d Cir. 1952), cert. denied, 345 U.S. 904 (1953).

80. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Alcorta v. Texas*, 355 U.S. 28, 31-32 (1957).

81. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). See generally Cahn, *Law in the Consumer Perspective*, 112 U. Pa. L. Rev. 1, 7-12 (1963); Note, *The Duty of the Prosecutor To Disclose Exculpatory Evidence*, 60 Colum. L. Rev. 858 (1960).

The primary consideration is the duty of the prosecutor to present the case against the defendant fairly. A prosecutor mindful of this responsibility may be disposed to reveal weaknesses in his case and evidence of possible defenses of which he is aware.

The constitutional constraints conducive to disclosure should serve to deflate the overvalued elements of secrecy and surprise. It bears noting, however, that such constraints cannot alone assure the development of optimum discovery procedures.

I turn now to criminal discovery in my own state because it affords so sharp a contrast to federal practice and perhaps also some portent of comparable expansion in areas where restrictive rules still prevail. In California, statutory law accords the defendant a right before trial to a transcript of the grand-jury testimony if he is prosecuted by indictment or to a transcript of the testimony at his preliminary hearing if he is prosecuted by information.<sup>82</sup> The statutes, however, do not require the prosecution to present its entire case in grand-jury proceedings or at the preliminary hearing or to inform the defendant of evidence not there presented that it intends to introduce at the trial. Developments in this regard have been left to judicial decision.

In 1956, the court in *People v. Riser*<sup>83</sup> established the right of the defendant to obtain at trial a statement made by a prosecution witness to the police. That decision emerged from the reasoning that

[a]bsent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits. To deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the true purpose of a criminal trial, the ascertainment of facts.<sup>84</sup>

That reasoning applies with like force to pretrial discovery; accordingly, a defendant now has a right to such discovery of facts known to the prosecution.<sup>85</sup>

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See also *United States v. Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir. 1961), 62 Colum. L. Rev. 526 (1962). Compare *Palermo v. United States*, 360 U.S. 343, 362-65 (1959) (Brennan, J., concurring) (sixth amendment may sometimes require production of witnesses' statements).

82. Cal. Pen. Code §§ 938.1, 869. See Cal. Pen. Code § 943.

83. 47 Cal. 2d 566, 305 P.2d 1 (1956).

84. *Id.* at 586, 305 P.2d at 13.

85. See cases collected in *Jones v. Superior Court*, 58 Cal. 2d 56, 58, 372 P.2d 919, 920, 22 Cal. Rptr. 879, 880 (1962).

There remains to be articulated how much the right encompasses. The defendant must show better cause for discovery "than a mere desire for the benefit of all information which has been obtained by the People in their investigation of the crime."<sup>86</sup> A showing, however, that the defendant cannot readily obtain the information through his own efforts will ordinarily entitle him to pretrial knowledge of any unprivileged evidence, or information that might lead to the discovery of evidence, if it appears reasonable that such knowledge will assist him in preparing his defense. Moreover, in the absence of a countervailing showing by the prosecution that the information may be used for an improper purpose,<sup>87</sup> discovery is available not merely in the discretion of the trial court, but as a matter of right.

Thus, defendants are entitled to pretrial discovery of the names and addresses of witnesses,<sup>88</sup> photographs,<sup>89</sup> results of scientific and other investigations,<sup>90</sup> and statements to the police by defendants or witnesses, whether or not the statements are signed or acknowledged.<sup>91</sup> The defendant need not claim ignorance of the facts; he need claim only ignorance of the contents of the statements or the details of the materials he seeks to inspect.<sup>92</sup> He need not show that the material sought will be admissible into evidence; he need show only that it may aid him in the ascertainment of the facts.<sup>93</sup> If necessary, he may also obtain an order that

86. *People v. Cooper*, 53 Cal. 2d 755, 770, 349 P.2d 964, 973, 3 Cal. Rptr. 148, 157 (1960).

87. *People v. Lopez*, 384 P.2d 16, 28-30, 32 Cal. Rptr. 424, 436-38 (1963) (identity of prosecution witnesses withheld until twenty-four hours before they were to testify on showing that they might be subject to tampering or elimination). See Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 Calif. L. Rev. 56, 99-101 (1961), urging the propriety of limiting right to discovery to prevent abuse when organized crime or criminal gangs are involved.

88. *People v. Lopez*, *supra* note 87; *Norton v. Superior Court*, 173 Cal. App. 2d 133, 136, 343 P.2d 139, 141 (Dist. Ct. App. 1959). See *People v. Cooper*, 53 Cal. 2d 755, 770, 349 P.2d 964, 973, 3 Cal. Rptr. 148, 157 (1960).

89. *Norton v. Superior Court*, *supra* note 88, at 136, 343 P.2d at 141. See *People v. Cooper*, *supra* note 88, at 770, 349 P.2d at 973, 3 Cal. Rptr. at 157 (1960).

90. *Brenard v. Superior Court*, 172 Cal. App. 2d 314, 318, 341 P.2d 743, 746 (Dist. Ct. App. 1959); *Schindler v. Superior Court*, 161 Cal. App. 2d 513, 520, 327 P.2d 68, 73 (Dist. Ct. App. 1958); *Walker v. Superior Court*, 155 Cal. App. 2d 134, 141, 317 P.2d 130, 135 (Dist. Ct. App. 1957). See *People v. Cooper*, 53 Cal. 2d 755, 770, 349 P.2d 964, 973, 3 Cal. Rptr. 148, 157 (1960).

91. *People v. Garner*, 57 Cal. 2d 135, 142, 367 P.2d 680, 684, 18 Cal. Rptr. 40, 44 (1961); *People v. Estrada*, 54 Cal. 2d 713, 355 P.2d 641, 7 Cal. Rptr. 897 (1960); *Cash v. Superior Court*, 53 Cal. 2d 72, 346 P.2d 407 (1959); *Funk v. Superior Court*, 52 Cal. 2d 423, 340 P.2d 593 (1959); *People v. Cartier*, 51 Cal. 2d 590, 594, 335 P.2d 114, 117 (1959); *Vance v. Superior Court*, 51 Cal. 2d 92, 330 P.2d 773 (1958); *Powell v. Superior Court*, 48 Cal. 2d 704, 312 P.2d 698 (1957).

92. *Cash v. Superior Court*, *supra* note 91; *Vance v. Superior Court*, *supra* note 91; *Powell v. Superior Court*, *supra* note 91.

93. *People v. Estrada*, 54 Cal. 2d 713, 716, 355 P.2d 641, 642, 7 Cal. Rptr.



the prosecution refrain from interfering with defense counsel's right to seek interviews with witnesses.<sup>94</sup>

It bears noting that discovery against the prosecution either before or at the trial can be invoked only if the prosecution can produce the material requested. Material in the possession of United States officials in their official capacity, for example, cannot be obtained without their consent for use in a state prosecution. As in the case of other material beyond the process of the court, the unavailability of material in the possession of United States officials does not preclude a conviction unless state officials played some part in putting it beyond reach.<sup>95</sup>

The statutory provisions governing subpoenas have been interpreted as precluding the taking of depositions of witnesses for the purposes of pretrial discovery.<sup>96</sup> Such an interpretation can be reconciled with the trend toward a broad right of discovery by the defense. The prosecutor is directly involved in the conduct of the action and is therefore subject at all times to the inherent power of the court to regulate the proceedings before it. Independent witnesses, on the other hand, may be strangers to the litigation except when testifying, and the courts are understandably slow to invoke their inherent power to expand compulsory process against such witnesses. It is too early to say whether additional experience will disclose a need to provide for additional pretrial discovery from independent witnesses. It may develop that a defendant needs no more than the right to discover the identity of such witnesses and any statements they have made to the police and the right to obtain orders when necessary to prohibit the prosecutor from instructing witnesses not to talk to defense counsel.

The development in California of pretrial discovery in criminal cases owes much to the availability of the writs of mandamus and prohibition to review orders granting or denying discovery.<sup>97</sup>

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897, 898 (1960); *People v. Cooper*, 53 Cal. 2d 755, 770, 349 P.2d 964, 973, 3 Cal. Rptr. 148, 157 (1960); *Cash v. Superior Court*, 53 Cal. 2d 72, 346 P.2d 407 (1959); *People v. Chapman*, 52 Cal. 2d 95, 98, 338 P.2d 428, 430 (1959); *Walker v. Superior Court*, 155 Cal. App. 2d 134, 141, 317 P.2d 130, 134 (Dist. Ct. App. 1957).

94. *People v. Cooper*, *supra* note 93, at 770-71, 349 P.2d at 973-74, 3 Cal. Rptr. at 157-58; *Yannacone v. Municipal Court*, 34 Cal. Rptr. 838 (Dist. Ct. App. 1963); *Clark v. Superior Court*, 190 Cal. App. 2d 739, 743, 12 Cal. Rptr. 191, 193 (Dist. Ct. App. 1961); *Walker v. Superior Court*, *supra* note 93, at 140, 317 P.2d at 134.

95. *People v. Parham*, 384 P.2d 1001, 1003, 33 Cal. Rptr. 497, 499 (1963).

96. *Clark v. Superior Court*, 190 Cal. App. 2d 739, 12 Cal. Rptr. 191 (Dist. Ct. App. 1961). See *Yannacone v. Municipal Court*, 34 Cal. Rptr. 838 (Dist. Ct. App. 1963).

97. In the federal courts, orders granting or denying discovery can ordinarily

If, for example, a defendant could not challenge an order denying pretrial discovery except on appeal from a final judgment of conviction, the issue of whether discovery should have been granted at the pretrial stage, turning on the time of discovery, might easily be sidetracked. In the event the trial court had also denied discovery at the trial, the main preoccupation would be with the propriety of discovery rather than with the appropriate time for it. If instead the trial court granted discovery at the trial, the defendant might find it difficult indeed to show that he was prejudiced by the denial of discovery at the pretrial stage. The main preoccupation would then be with the question whether the defendant had been given adequate time to make appropriate use of the information discovered. In effect the issue would become one of the proper exercise of the trial court's discretion with regard to a continuance. Appellate courts do not readily find an abuse of discretion. Hence, the pretrial remedies, the writs to review orders on discovery at the pretrial stage, have served as a reminder that a sense of time in the law may be no less important than a sense of place and that no two times are alike.<sup>98</sup>

The extension of pretrial discovery to defendants has activated speculation on the possibilities of extending the right of discovery to the prosecution. The California Supreme Court confronted the problem in *Jones v. Superior Court*.<sup>99</sup> A defendant charged with rape was granted a continuance of his trial so that he could gather medical evidence that past injuries had made him impotent and therefore physically incapable of committing rape. On motion of the prosecution, the trial court directed the defendant to give the prosecution the names of all physicians subpoenaed by the defendant to testify about the alleged injuries and those of all physicians who had examined or treated him with

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be attacked only on appeal from the final judgment. See *Byram Concretanks, Inc. v. Meaney*, 286 F.2d 170 (3d Cir. 1961); *Pennsylvania R.R. v. Kirkpatrick*, 203 F.2d 149 (3d Cir. 1953); *United States v. Bondy*, 171 F.2d 642 (2d Cir. 1948); *Copp v. United States*, 168 F.2d 191 (1st Cir. 1948). Compare *Atlass v. Miner*, 265 F.2d 312, 313 (7th Cir. 1959), *aff'd*, 363 U.S. 641 (1960).

98. The possibilities that discovery offers to clarify issues and expedite trials should not be vitiated, however, by meretricious and time-consuming challenges of the right to discovery. Formal motions for discovery and appellate review of discovery orders should be the exception rather than the rule, reserved for genuine questions regarding the scope of an applicable privilege or directed against indiscriminate discovery.

The reasons that militate against wholesale writs of review also militate against a right to discovery before the preliminary hearing except in the unusual situation where it would enable the defendant to establish at the hearing that the prosecution's case is without foundation. We have accordingly discouraged such discovery in the usual situation in California by denying petitions for writs to compel discovery before the preliminary hearing.

99. 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).



respect to the alleged injuries, as well as all related medical reports and X-rays. The defendant sought a writ of prohibition to prevent enforcement of the trial court's order on the grounds that it violated his privilege against self-incrimination and that, in any event, the court had no authority to make it. We reviewed the cases that had granted pretrial discovery to defendants and noted that, in the absence of any applicable privilege, neither side had a valid interest in denying to the other access to evidence that could throw light on the issues of the case. We held that since there was no express legislation governing criminal pretrial discovery, it was as proper for the courts to develop rules governing discovery in favor of the prosecution as it had been to develop such rules in favor of the defendant.

Since the defendant could not be compelled to testify or produce private documents in his possession, we recognized that ordinarily the prosecution could not require him to reveal his knowledge of the existence of possible witnesses and the existence of reports and X-rays for the purpose of preparing its case against him. Did it therefore follow that the defendant could not be required to reveal in advance the witnesses he intended to call at the trial and the evidence he intended to introduce? A number of states by statute require a defendant specifically to plead certain defenses such as insanity or alibi and to reveal in advance of trial the names of the witnesses who will be called in support of such defenses.<sup>100</sup> These statutes have been sustained over the objection that they violate constitutional privileges against self-incrimination, for they do not compel the defendant to reveal or produce anything, but merely regulate the procedure by which he presents his case.<sup>101</sup> We found this reasoning persuasive. The trial court's order that the defendant reveal the names of witnesses he intended to call and produce reports and X-rays he intended to introduce in evidence simply required him to disclose information that he would shortly reveal in any event. He was thus required only to decide at a point earlier in time than he would ordinarily have to whether to remain silent or to disclose the information. He lost only the possible tactical advantage of taking the prosecution by surprise at the trial, an advantage that in any event would easily have gone for naught given the probability that the trial court would have granted the prosecution a continuance to prepare a rebuttal. We therefore concluded that in this regard the order did not violate the defendant's privilege

100. See *Louisell, Criminal Discovery: Dilemma Real or Apparent?*, 49 *Calif. L. Rev.* 56, 61 n.13 (1961).

101. See *Dean, Advance Specifications of Defense in Criminal Cases*, 20 *A.B.A.J.* 435, 440 (1934).

against self-incrimination or the due process requirements of a fair trial and held that the prosecution could discover such information before trial. Since the trial court's order was not limited to the discovery of such information, however, we prohibited its enforcement to the extent that it required the defendant to reveal information that he did not intend to reveal at the trial.

There were two dissents. One took the view that the constitutional privilege against self-incrimination entitled the defendant to wait until the prosecution had presented its case at the trial to decide what defenses he would invoke and what evidence he would introduce. The other made no commitment on this constitutional question. Its view was that the majority opinion opened the door to serious curtailments of the theretofore recognized right of the defendant to conceal his strategy until the prosecution put on its case, and that such curtailments should be made, if at all, only by the legislature.

The privilege against self-incrimination protects the defendant from assisting the prosecution in proving his guilt. Once he makes a defense, however, through testimony or the disclosure of material witnesses or through documents or other real evidence, he opens the door to the discovery of evidence against him that might otherwise remain undiscovered. It rests with him to determine the extent to which he wishes to waive his privilege. To do so intelligently, he must be informed of the case against him before trial.

One must keep in mind that in the event of a surprise defense, the prosecution in all likelihood would be granted a reasonable continuance to meet it. Certainly, such a continuance would not impair the privilege against self-incrimination or the due process requirements of a fair trial. Likewise, nothing is lost of the privilege, and much is gained in orderly procedure, if the defendant is required to give advance notice of the evidence he intends to offer in defense after he has himself received pretrial discovery of the prosecution's case. He can hardly demand pretrial discovery and still insist on reserving his own surprises for the trial. The good coin of discovery gains in value when it is fairly exchanged at the appropriate procedural hours. Neither the privilege against self-incrimination nor the due process requirements of a fair trial fix the time when the prosecution has presented its evidence at the trial as the only procedural hour at which the defendant can be required to make his decision whether to remain silent or to present his defense. Surely he can be required to make that decision before trial if he is given discovery

of the prosecution's case before trial. A contrary decision in the *Jones* case would not only have compelled resort to continuances with their attendant delays, but would have foreclosed the development in criminal cases of pretrial conferences, which in civil cases have served to limit and refine issues and to facilitate the settlement of cases.<sup>102</sup>

Valuable though discovery has proved in clarifying issues and expediting their trial, it has yet to overcome the usual resistance of those who are set in old ways. Discovery is a bad word to devotees of the old-time theater of hide-and-go-seek. It is time to ask whether the element of surprise they set such store by is not one of the most overrated elements in the judicial process. It is one thing to acknowledge its usefulness in testing credibility, but quite another to glorify it as the keystone of the adversary system. If it were indeed the keystone, the arch would in truth be fallen. The truth is most likely to emerge when each side seeks to take the other by reason rather than by surprise. The more open the process for eliciting it, the less need there is of surprise.

Despite abundant demonstration to the contrary,<sup>103</sup> there is lingering objection to criminal discovery by the defendant on the ground that it adds an undue advantage to those he already enjoys. There is no question that our legal system abundantly protects the accused; anyone who has lived under that system would hardly have it otherwise. The only question is whether affording discovery to the defendant amounts to overprotection. One can determine that question only in relation to what he is protected against. From the outset, he is under a cloud of suspicion despite the presumption of his innocence. Though the prosecution carries the burden of proof, it ordinarily has substantial resources for marshaling evidence against him, particularly now with the advantage of scientific aids. He may be subjected to intensive questioning without an attorney present on his behalf. Even if bail is available, he may have no money to avail himself of it.

Can it be said that under these circumstances he will be overprotected, or even that he will put the prosecution at a disadvantage, if he is allowed discovery? At most, he will be better able to prepare an answer to the charges against him than if he attempted to do so in the dark. He will have timely knowledge of evidence that might be impossible for him to investigate once the trial is under way or that he could perhaps not afford to investigate at any stage. He will have access to evidence that he

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102. See text accompanying notes 42-45 *supra*.

103. See Brennan, *supra* note 58, at 283-85; Goldstein, *The State and the Accused—Balance of Advantage in Criminal Procedure*, 69 *Yale L.J.* 1149 (1960).



might not be able to discover independently. He has a legitimate interest in making his own evaluation of such evidence, and if his interest is no greater than the prosecution's, it is certainly no less.

Whenever the circumstances of a particular case appear to justify secrecy, the prosecution should of course be free to make such a showing.<sup>104</sup> It is usually in a position to ascertain whether the evidence it has against the defendant is limited to his case or would continue to be pertinent in an investigation of well-organized or even sporadic gang crime, and hence whether it should press to bar the evidence from discovery. If the prosecution has assurance of secrecy upon a showing of circumstances to justify it, there would be little objection to full pretrial disclosure to the defense when there is no reasonable basis for secrecy.

Perhaps the experience in California and in other states<sup>105</sup> that are experimenting with criminal discovery will lead to its widespread acceptance in the United States. The *Jones* case, indicating the two-sidedness of the discovery process, suggests that we may be on the way to abandoning our preoccupation with surprise tactics just as we have substantially abandoned the technicalities of pleading that in their time were also overvalued. Able lawyers have more than enough opportunity to display their virtuosity in the clarification of real issues. It is no mean task to isolate what the issues are, and in that task both sides would be well served by discovery. There is more tensile strength in the adversary system and a deal more nobility in the profession when adversaries foster procedures that set them free from trick and device and enable them to meet in grand encounter on the issues.

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104. See *People v. Lopez*, 384 P.2d 16, 28-30, 32 Cal. Rptr. 424, 436-38 (1963).

105. See generally Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 *Stan. L. Rev.* 293 (1960).